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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND,

Petitioner,

v.

ROBERT G. DIEHL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

STEPHEN H. SACHS,
Attorney General of Maryland,

STEPHEN NORRIS ROSENBAUM,
Assistant Attorney General,
Munsey Building — 4th Floor,
Seven North Calvert Street,
Baltimore, Maryland 21202,
Telephone — (301) 576-6424,
Attorneys for Petitioner.

QUESTIONS PRESENTED FOR REVIEW

1. Is yelling, "Fuck you, Gavin," to a police officer after being ordered to get back into the passenger seat of a car, which the police officer had just stopped, protected speech under the First Amendment?

2. Was there probable cause under the Fourth Amendment for Respondent's arrest so as to sustain Respondent's convictions for resisting arrest notwithstanding the subsequent appellate reversal for insufficient evidence of the disorderly conduct conviction for which Respondent was arrested?

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OPINION BELOW

The opinion of the Court of Appeals of Maryland, Diehl v. State, No. 67, Sept. Term, 1981 (Md., opinion by Cole, J., filed Oct. 13, 1982), reported but not yet printed, is included as an Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals of Maryland, which is sought to be reviewed, was filed on October 13, 1982. This Petition is filed within 60 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States

[Amendment I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[Amendment IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Annotated Code of Maryland

§ 121. Obstructing free passage; making unseemly noises; obscene language, etc.

Any person who shall wilfully obstruct or hinder the free passage of persons passing along or by any public street or highway in any city, town or county of this State, or who shall wilfully disturb any neighborhood in such city, town or county by loud and unseemly noises, or shall profanely curse and swear or use obscene language upon or near to any such street or highway within the hearing of persons passing by or along such highway, or shall wilfully hinder or obstruct the free passage of persons passing on or through or out of the station grounds of any railroad in the State, or who shall wilfully act in a disorderly manner within such station grounds by making such loud and unseemly noises, or by catching hold of and soliciting persons on said grounds against the will of such person, shall, upon conviction thereof, be sentenced to a fine of not less than one dollar and not more than one hundred dollars or shall be subject to imprisonment for no more than thirty days, or shall be subject to both such fine and imprisonment, in the discretion of the court and shall pay costs of the prosecution.

STATEMENT OF THE CASE

Robert G. Diehl, Respondent, was, on May 26, 1980, convicted by a jury in the Circuit Court for Washington County, Maryland (Corderman, J.) of disorderly conduct and two counts of resisting arrest. He was sentenced to 30 days in jail for disorderly conduct and, concurrently, to consecutive three-year terms for each conviction for resisting arrest.

A timely appeal to the Court of Special Appeals of Maryland was filed in which Respondent questioned whether the evidence was sufficient to sustain the convictions. After the case was briefed and argued, the Court of Special Appeals applied, pursuant to Md. Rule 1015, for certification of the case to the Court of Appeals of Maryland. By its Order of September 15, 1981, the Court of Appeals of Maryland (Murphy, C.J.) granted the application and issued a writ of certiorari to the Court of Special Appeals of Maryland to review the following questions:

"(1) Did . . . [Respondent's] pre-arrest actions, as described, constitute disorderly conduct within the meaning of Md. Ann. Code art 27, § 121, in light of Downs v.

State, 278 Md. 610 (1976), cert. den. 431 U.S. 974?

(2) If not, did Officer Gavin nevertheless have probable cause to arrest . . . [Respondent] for that crime?

(3) If . . . [Respondent]'s pre-arrest actions, as described, do not constitute disorderly conduct, did he nevertheless have a lawful right to resist arrest (i) if Officer Gavin had probable cause to make the arrest, and (ii) if Officer Gavin did not have probable cause to make the arrest?"

On October 13, 1982, the Court of Appeals of Maryland reversed the judgment of the Circuit Court for Washington County, Maryland. Diehl v. State, No. 67, Sept. Term, 1981 (Md., opinion by Cole, J., filed Oct. 13, 1982). See Appendix.

The relevant facts were accurately stated by the Court of Special Appeals of Maryland in its Application:

"At approximately 10:25 p.m. on 8 January, 1980, Vincent Edward Gavin, Chief of Police of the Hancock Police Department, observed a vehicle with one headlight out stopping and spinning its wheels on Main Street. Gavin put on his blue light and

pulled the vehicle over into an A & P supermarket parking lot. Upon observing several persons in the vehicle, he radioed for a back-up unit for safety reasons. As he approached the stopped vehicle, . . . [Respondent] and the driver got out. Gavin ordered both of them back into the vehicle so that he could maintain order at the scene. He felt that if everyone got out of the car it would 'be chaotic.' Following Gavin's order, the driver got back into the car, but . . . [Respondent] refused and began yelling obscenities. When questioned regarding the obscenities . . . [Respondent] was yelling, Gavin replied, 'he said, Fuck you, Gavin. I know my rights. You can't tell me what to do and things like that.' According to Gavin, . . . [Respondent] repeated this language several times in a loud and hostile voice, and as a result people began to gather. When . . . [Respondent] refused to get into the car after being told that 'my dealings weren't with him, they were with the driver,' . . . [Respondent] was arrested. On cross-examination Gavin stated he arrested . . . [Respondent] because he was 'screaming obscenities and he was drawing a crowd.' While Gavin was handcuffing . . .

[Respondent] and searching his person, . . . [Respondent] kicked and struggled before finally being placed into the police cruiser with the aid of another officer who had arrived on the scene. Thereafter, while the police were dispersing the crowd and arresting another person who yelled obscenities and protested . . . [Respondent]'s arrest, . . . [Respondent] escaped from the police cruiser and was recaptured [by Trooper Blenard of the Maryland State Police] fifteen to twenty minutes later after a struggle." When Respondent escaped from the police cruiser, he screamed at his companions and threw and kicked to them the fruits of the search of his person. In the process of resisting capture by Blenard, Respondent kicked and hit Blenard and called him a "'fucking pig.'"

The Court of Appeals of Maryland held (1) that Respondent's arrest for disorderly conduct was without probable cause because Respondent's oral communication to Gavin constituted speech; because Md. Ann. Code art. 27, §121 did not proscribe Respondent's communication to Gavin in view of Respondent's First Amendment rights; and because Respondent's communication to Gavin

cannot be considered fighting words, and (2) that Respondent's convictions for resisting arrest were, as a result, improper where Respondent used reasonable force to resist the unlawful arrest. Rodowsky, J., Murphy, C.J., and Smith, J., dissented on the grounds that, even if the majority correctly held that the evidence was insufficient to sustain the conviction for disorderly conduct, there was probable cause for that arrest such that Respondent was properly convicted for resisting arrest.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS OF MARYLAND DID NOT FOLLOW THE APPLICABLE DECISIONS OF THIS COURT AND INCORRECTLY HELD THAT RESPONDENT'S UTTERANCE WAS PROTECTED SPEECH AND THAT THERE WAS NO PROBABLE CAUSE FOR RESPONDENT'S ARREST.

Without authority for its proposition, the Court of Appeals of Maryland abruptly concluded that Respondent's communication to Gavin was "speech":

> ". . . [Respondent]'s oral communication in this situation clearly constituted speech. Our examination of the record indicates that Gavin ordered . . . [Respondent] to get back into the car; however, the officer did not have any right to

> make this demand on . . . [Respondent]. Only then did . . . [Respondent] begin to address Gavin. . . . [Respondent]'s communication expressed his outrage with this unlawful police conduct, it was addressed only to Gavin (he was not trying to disturb others or exhort them to breach the peace), and his words were chosen to emphasize his outrage (not to offend others). Gavin's order precipitated the entire episode; [Respondent]'s speech was merely a response. Even the time and decibel level of this response was a communication that, although distasteful, should not have been surprising to Gavin." (Apx. at 6-7).

The Court of Appeals of Maryland then held that Md. Ann. Code art. 27, §121 did not proscribe Respondent's communication to Gavin[1] and that the communication could not

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[1]Respondent nowhere challenged the correct conclusion by the Court of Appeals of Maryland that "if however, the verbal conduct was noncommunication but, nevertheless could be reasonably expected to cause a potentially violent disruption, then there was no speech interest involved and the conduct may be constitutionally controlled [by §121]." (Apx. at 6). Compare Gooding v. Wilson, 405 U.S. 518 (1972) (Ga. Code Ann. §26-6303 held unconstitutional because its application was not limited to words that "'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.'")

be considered fighting words. This analysis is incorrect.

Various classes of speech, including "fighting words," may be regulated by statutes held, and in this case conceded to be, constitutional:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut, 310 U.S. 296, 309, 310 . . . ."

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnotes omitted).

The utterance by Respondent was not protected speech, for it constituted "fighting words." The holding of the Court of Appeals of Maryland that Respondent's words were other than "epithets or personal abuse" is the result of the baseless conclusion that Respondent knew that Diehl's order that Respondent get back into the car was unlawful and that Respondent was thus communicating his outrage with the order. The propriety of Gavin's order was not attacked by Respondent at trial or on appeal. The Court of Appeals of Maryland, moreover, cites no authority for the proposition that Respondent should have known that which only Gavin, theoretically, should have known through his manual, i.e., that Respondent, once he exited the car, should have been ordered to stand "on the curb side of the vehicle." (Apx. at 16 n. 6). Even this recommendation acknowledges Gavin's right to have ordered Respondent to do something; the Court of Appeals of Maryland draws a very fine line in distinguishing between a curb side and a seat in a car, Gavin's choice for safety reasons. For the reasons stated in the dissent, therefore,

Respondent's utterance constituted but "epithets or personal abuse" when confronted with Gavin's reasonable order. Apx. at dissent 9-12.

The ultimate conclusion of the Court of Appeals of Maryland that Gavin's order was unlawful is, moreover, of no moment in assessing Respondent's utterance as "fighting words." Respondent, rather than assisting Gavin in preventing chaos, by his repetition in a loud and hostile manner of the phrase, "Fuck you, Gavin," attracted a crowd and enhanced the possibility of chaos. Gavin, who was already concerned for his safety, surely was an individual addressee of speech having a direct tendency to provoke him to violence. The fact that the comment was directed only to a police officer does not preclude a conviction. Stults v. State, 336 N.E.2d 669, 672 (Ind. App. 1975); City of Saint Paul v. Morris, 104 N.W.2d 902, 903 (Minn. 1960), cert. denied, 365 U.S. 815 (1961). But see Lewis v. City of New Orleans, 408 U.S. 913 (1972) (Powell, J., concurring). Nor is resultant violence or feeling insulted an element of the crime of disorderly conduct. City of Little Falls v. Witucki, 295 N.W.2d 243, 246 (Minn. 1980).

The facts in this case are thus similar to those in Gooding v. Wilson. Had it not been for the question of the constitutionality of the statute, a question not presented in this case, Wilson's comments would surely have been held non-protected for the reasons stated by Justice Blackmun in dissent:

> "It seems strange, indeed, that in this day a man may say to a police officer, who is attempting to restore access to a public building, 'White son of a bitch, I'll kill you' and 'You son of a bitch, I'll choke you to death,' and say to an accompanying officer, 'You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces,' and yet constitutionally cannot be prosecuted and convicted under a state statute. . . ." 405 U.S. at 534.

Justice Blackman's observation is appropriate to this case: "This, however, is precisely what the Court [of Appeals of Maryland] pronounces as the law today." Id.

Assuming, arguendo, that the Court of Appeals of Maryland correctly concluded that the evidence was insufficient to sustain Respondent's conviction for disorderly conduct, Respondent's convictions for resisting arrest were proper because there was, contrary to the holding of the Court of Appeals

of Maryland, probable cause for the arrest.

"'[P]robable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Michigan v. DeFillippo, 443 U.S. 31, 37 (1979). In its opinion, the Court of Appeals of Maryland stated, "Having concluded that there was no probable cause for . . . [Respondent's] arrest for disorderly conduct, since . . . [Respondent's] verbal response was precipitated by an unlawful police order, it is obvious that, in these circumstances his convictions for resisting arrest must also fall." Apx. at 18. The basis for this conclusion, however, was the holding that Respondent's oral communication to Gavin constituted speech; that Md. Ann. Code art. 27, §121 did not proscribe Respondent's communication to Gavin in view of Respondent's First Amendment rights; and that Respondent's communication to Gavin cannot be considered fighting words. The Court of Appeals of Maryland has thus imposed upon the police a standard for

determining probable cause -- whether the evidence is sufficient to sustain a conviction for the crime for which the arrest is made -- which is contrary to that which has, according to this Court in Michigan v. DeFillippo, 443 U.S. at 37, been stated "repeatedly." Indeed, the standard used by the Court of Appeals of Maryland is not relevant in determining whether an arrest is permitted under the Fourth Amendment because it is based upon probable cause:

> "The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest. We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest." Id. at 36.

Had the Court of Appeals of Maryland applied the correct definition, it could have come to no conclusion other than that at which the dissenting opinion arrived, i.e., that, under the facts in this case and especially where the validity of Gavin's order was not challenged at trial or on appeal, Gavin had probable cause to arrest Respondent for disorderly conduct. Apx. at dissent 1-4.

Respondent's convictions for resisting arrest were thus proper.

CONCLUSION

Because the Court of Appeals of Maryland has decided the First and Fourth Amendment questions presented in this case in a way in conflict with the applicable decisions of this Court, Petitioner prays that, pursuant to Sup. Ct. R. 17.1(c), a Writ of Certiorari be issued to review the decision of the Court of Appeals of Maryland.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland

STEPHEN NORRIS ROSENBAUM,
Assistant Attorney General
Munsey Building - 4th Floor
Seven North Calvert Street
Baltimore, Maryland 21202
Telephone - (301) 576-6424

Attorneys for Petitioner